
COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

SUPREME JUDICIAL COURT
Docket No. SJC-11459

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

ROBERT UPTON,
Appellant

On Appeal From a Judgment of Conviction in
Barnstable Superior Court 0972CR167

**BRIEF OF
APPELLANT ROBERT UPTON**

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STATEMENT OF ISSUES

1. Should the defendant's second Motion for a New Trial have been allowed, where newly discovered evidence shows that the Commonwealth had an undisclosed cooperation agreement with its prime witness?
2. Should the second Motion for New Trial have been allowed, where the Commonwealth's prime witness subsequently plead guilty to the reduced charge of Manslaughter, thereby acknowledging his culpability for this homicide, where he testified in this trial that he had nothing to do with the death?
3. Should the second Motion for New Trial have been allowed, where the Commonwealth's theory was that this was a murder for hire, and where a civil jury in a wrongful death action later determined that the person who supposedly hired the defendant had no culpability in this death?
4. Should the defendant be granted a new trial pursuant to G.L. c. 279 § 33E?

STATEMENT OF CASE

In December 2009, Robert Upton (0972CR00167) and Christopher Manoloules ("Chris")¹ (0972CR00158) were indicted for murder (G.L. c. 265 § 1) and other charges by a Barnstable County grand jury. A-3,190.² In September 2010, Chris' father Treefon Manoloules ("Treefon")(1072CR00126) was similarly indicted. A-231. The decedent was Treefon's brother, Aris Manoloules ("Aris"). 2/269.

Treefon's case was tried before a jury from September 19, 2011 to October 4, 2011 (Nickerson, J.,

¹ Defendant refers to the Manoloules family members by their first name.

² The trial transcripts are cited as: *Volume/page*. The page numbers do not restart from the number "1" on each volume; rather, they continue the numbering from the prior volume.

The appendix is cited A-page. The first three volumes were also the three volumes that the defendant submitted to the trial judge in support of the motion for new trial. The pagination has been preserved.

Contained in the appendix at pages A-25 and A-103, respectively, are Trial Exhibits I and J (transcripts of the defendant's interrogations), which are cited as: I/page and J/page. 7/1060.

The appendix contains several transcripts from other cases. Parallel cites to Treefon Manoloules' criminal trial transcript are: TREE-page. Parallel cites to Chris Manoloules' May 29, 2013 plea transcript are: PLEA-page. Parallel cites to the civil Wrongful Death trial transcripts are: Date-page.

These collateral transcripts were included in the appendix for the second motion for new trial, and are thus part of the record on appeal.

presiding). A-229,233. Chris testified against his father in that trial. A-239,241, 246 (TREE-1,3,683). Treefon was found not guilty. A-238.

The instant defendant's case was then tried before a jury from January 7, 2013 to January 17, 2013 (Nickerson, J., presiding). A-3,10. Chris testified for the Commonwealth in this trial also. 4/498. Mr. Upton was found guilty of First Degree Murder, on Deliberate Premeditation and Felony Murder theories. 9/1364; A-13. He was also found guilty of Aggravated Assault and Battery with a Dangerous Weapon (G.L. c. 265, § 15A), and Armed Assault in a Dwelling (G.L. c. 265 § 18A). 9/1365; A-13. He was found not guilty of Armed Assault to Murder or Rob (G.L. c. 265 § 18(b)). 2/233, 9/1364; A-13.

On January 18, 2013, Upton was given a life sentence on the Murder conviction. 10/1383; A-13. He was given concurrent sentences of incarceration for terms of years on the other convictions. A-13. On January 24, 2013, a Notice of Appeal was timely filed. 10/1383-1384; A-14, 816.

On May 29, 2013, four months after Upton's trial, the Murder charge against Chris was reduced to Manslaughter. A-194. Chris plead guilty and he was

given a 12 to 15-year sentence (Rufo, J.). A-195, 226 (PLEA-31). He also plead guilty to Armed Assault with Intent to Murder or Rob; Aggravated Assault and Battery with a Dangerous Weapon; and Armed Assault in a Dwelling. A-195, 226-227 (PLEA-31-32). He was given concurrent sentences of incarceration for lesser periods of time on these latter convictions. Id.

On January 20, 2015, Mr. Upton filed a Motion for New Trial, through appellate counsel Jeffrey Baler. A-14. The motion was denied, without a hearing, on November 17, 2015 (Nickerson, J.). Id. A Notice of Appeal was timely filed. A-15. Thereafter Attorney Baler withdrew, and instant counsel was appointed. Id.

Meanwhile, a wrongful death action was filed in Middlesex Superior Court in 2012. A-302,307. That case was tried by a jury on October 4-14, 2016. A-301. The jury found against Chris and Upton. A-307. The jury found in favor of Treefon. Id.

Upton filed a second motion for new trial. A-737, 743. This motion was largely based on Chris' testimony in the wrongful death suit. A-747. On July 24, 2018, the trial judge (Nickerson, J.) denied the motion without a hearing in a 17-page decision. A-737,799. A Notice of Appeal was timely filed. A-738,818.

STATEMENT OF THE FACTS
Summary

On September 30, 2009, Aris was found dead in his Hyannis home with gunshot wounds. Chris testified on behalf of the Commonwealth that he and Upton went to Aris' house to reconnoiter for a future robbery, but instead Upton committed a murder. No one else was in the house. Chris denied having any agreement with the Commonwealth in exchange for his testimony. He denied expecting any benefit for his testimony.

Upton denied any involvement in the murder. He acknowledged driving Chris to the Cape on the day Aris died. But once on the Cape, Chris set off on his own.

The issue at trial was Chris' credibility.

The decedent, Aris Manoloules, and his family

Emmanuel and Febrinina Manoloules had three children: sons Treefon and Aris (AKA "Theo Arie"), and daughter Irene. 4/503, 6/874-875. After Emmanuel died in 1994, Aris moved in with his mother and became her 24-hour caretaker. 6/875-879, 7/1073-1074. He gave up his job. 6/878. He had no children or spouse. 6/889.

Febrinina died in May of 2007, leaving her entire \$2,000,000.00 estate to Aris. 6/877,879-880,885, 7/1072. This prompted probate litigation. 6/879,886-

888; A-183,185. Treefon and Irene each received a \$40,000.00 settlement in 2008. 6/879,887. Aris kept everything else. 6/879-880. Notwithstanding the settlement, Treefon still felt hurt. 6/888.

Treefon is married to Deborah (nee Upton) Manoloules. 6/877, 7/1069-1070. They have three children: Christine, Christopher ("Chris", the co-defendant in this case), and Natalie. 6/878, 7/1070. At the time of trial in 2013, Chris was 21. 7/1070.

The co-defendant, Chris Manoloules, and his family

Up until grade seven, Chris Manoloules and his family lived in Northborough. 7/1071-1072. Chris was doing well in school. 7/1072,1079. Then the family moved to North Carolina, where he attended grades 8 and 9. 7/1071-1072. Again, Chris did well in school. Id. They were living in North Carolina when Treefon's mother died in May of 2007. 7/1072-1073.

At some point after Febrinina's funeral, Chris' family moved back to Massachusetts, now in Southboro. 7/1069,1079-1080. Chris enrolled in the tenth grade. 7/1075-1076,1079-1080. He was an average student. Id.

According to Chris' mother, at some point between the tenth and eleventh grades, Chris started hanging with the wrong crowd. 7/1080,1082. He started drinking

and using marijuana. 7/1080,1084. That progressed to cocaine. 8/1131. His life spiraled out of control. 7/1080,1085. He would not go to school. 7/1085.

Chris was also violent. One time he threw his father against the wall. 8/1133. Treefon received a cut from his glasses in that incident. Id. In addition, he was verbally abusive to his mother. 8/1133. He called her vulgar names. Id.

Things got so bad by January 2009 that Treefon and Deborah decided to send Chris to the Ivory Ridge Academy in upstate New York. 7/1085. Chris was in the eleventh grade. 7/1093. Two or three "transporters" hired by the school arrived in the middle of the night. 7/1089. Chris learned *from them* that he was going to be schooled in New York. Id.

Chris was at Ivory Ridge for about two months when the school closed. 7/1090. In March 2009 he was moved to a similar school in So. Carolina. 7/1090-1092. When Chris complained about the conditions, his parents brought him back home in May 2009. 7/1093.

Chris was happy to be home, but all his problems quickly returned. 7/1094. He resumed contact with the wrong crowd. 7/1094-1095,1098. Things spiraled downward again. Id. He ignored his summer curfew, and

returned to drinking and smoking marijuana. Id.

Chris' parents seek Upton's assistance with Chris

Chris' mother, Deborah, and defendant Robert Upton are siblings. 6/889, 7/1070. Robert married his wife Wendy in 1990. 8/1141-1142. They have two children, Hailey and Casie. Id. Their marital home was in Ipswich. Id. The defendant was a car salesman. Id.

Distraught at how Chris' situation had deteriorated over the summer of 2009, Treefon and Deborah decided to enlist the assistance of Upton. 7/1095. Treefon and Deborah thought that Chris would listen to Upton and finish school. 7/1095-1096.

Treefon called Upton. 7/1095. Thereafter Upton and Chris met. 7/1096-1097. Chris seemed motivated. Id. It was now September 2009 and school was back in session. 7/1097. Upton called Chris every morning to make sure he was awake and going to school. 7/1097. His efforts appeared to be producing results. 7/1096, 8/1134-1135. Upton had been working with Chris for about a week when Aris was found dead in the late afternoon of Wednesday, September 30, 2009. 3/336, 8/1134-1135.

The defendant and his girlfriend

In May of 2009, the still-married defendant

started living with his girlfriend, Erin O'Malley. 5/807,813. She lived in Newton. 5/808. They had been seeing each other for two years. 5/809. He told her he going through a divorce. Id. They were never engaged, but they talked about getting married. 5/812,835.

Upton told O'Malley that in addition to being a car salesman, he also worked for the National Security Agency (NSA). 5/813-814. He said he was a "director" and that he was absent for periods of time because he was on missions. 5/814. He said he would, "do things like help get rid of bad people for the government." Id. He also said that he was part of FEMA, that he was a trained Navy Seal, and that he had worked for the Border Patrol. 5/815-816.

In July of 2009, Upton told O'Malley he wanted her to have a summer car. 5/816-817. They went to Wagner Mercedes in Boylston, where he bought her a Mercedes convertible. 5/816-817, 6/910. He ordered it from Kansas, paying for it with a \$77,000.00 personal check. 5/816-817, 6/912,914. Upton previously worked with Wagner salesman Daniel Johnson. 6/911. As such, Johnson agreed to hold onto Upton's personal check because Upton said his wife had frozen his money. 6/912.

Upton said he was going to provide a certified check the following Monday. 6/912,924. He was going to get the money from his father, who was taking a loan against his home. 6/925. Thereafter Upton said he was going to get the money from his brother-in-law. Id.

When funds did not come through, Upton told O'Malley the car had been recalled. 5/817-818. But O'Malley checked on the internet and could not find a recall. 5/818. In response, Upton told her that the check he used to buy the car did not clear because the NSA had frozen his bank accounts. Id. He told her they needed to return the car. Id.

Notwithstanding O'Malley's testimony that the car was returned, the car salesman told the jury about a text he received from Upton the day before Aris' body was discovered. 6/939. On September 29, 2009 at 8:00 a.m., Upton texted the salesman,

My brother-in-law is getting the money for me, and I will know a lot more around 10:00 a.m. I didn't back (*sic*) till 3:00 a.m. And Merry (*sic*), I didn't reply. I will call you in a few hour. (*sic*). 6/929.

At the same time that Upton purchased a car for O'Malley, he leased a new two-seat silver Mercedes for himself. 5/816, 6/912,918. For this transaction Mr. Upton presented a power of attorney to Wagner that he

said was from his mother-in-law Wendy Krakowski.

6/921-922. He signed the lease documents pursuant to the power of attorney. 6/922.

For Labor Day 2009, O'Malley and Upton went to Fiji for about seven or eight days. 5/814-815. Upton paid for the trip by borrowing \$10,000.00 from O'Malley's father. 5/875. He said he needed the loan because the NSA had frozen his bank accounts. Id. Upton told O'Malley he was close to finishing a \$180,000.00 deal with a foreign national, and he would repay her father from that money. 5/834-835.

The defendant and his wife

The defendant's former wife, Wendy Upton, told the jury that they were not separated in 2009. 8/1146. She was not aware of the defendant's affair with Ms. O'Malley. 8/1149. In September of 2009, they "fell a little bit behind" on their home mortgage. 8/1148.

Wendy told the jury the defendant never served in the military, was never a Navy Seal, and never worked for the Border Patrol, FEMA, or the NSA. 8/1143-1144.

Chris' plotting to commit crimes

Dylan Laird was Chris' "brother in spirit." 6/980. He testified under a grant of immunity. 6/964. He knew Upton for about a week and a half. 6/973.

During that time, he planned with Chris, Upton, and Treefon to commit crimes. 6/974-975. The first plan involved stealing cars from a dealership where Upton was formerly employed. 6/975.

A second plan involved robbing a house. 6/976. Chris, Upton, and Laird drove around looking for a "candidate" house. Id.

A third plan, formulated by Chris, Treefon, and Upton, involved killing Aris. 6/976-977. Treefon said that Aris had poisoned his mother. 6/982-983. Treefon said Aris has, "got to be killed." 6/983. Chris said similar things. Id. They considered overdosing Aris, shooting him, and strangling him. 6/977.

Tuesday, 9/29/2009, the day before Aris' body is found

On Tuesday, September 29, 2009, between 3:30 p.m. and 3:50 p.m. Upton went to the Collectors Gallery gun shop. 5/847-850, 6/866. He purchased a Ruger P85 9 mm gun and ammunition. Id. He presented a valid gun license for the transaction, which was verified by running his fingerprint through the state database. 6/867. Upton complied with all the paperwork required for the purchase. Id. According to the clerk, Upton appeared calm and matter of fact. 6/871.

O'Malley came home from work about 7:00 p.m. and

expected Upton to be there, but he was not. 5/821-822.

She repeatedly texted him, but he did not respond.

Id. Finally, about 11:30 p.m. he responded that he was fine and that he had gone for a loaf of bread. Id. He said he was actually home and knew she had fallen asleep on the couch. Id. However, he was not home. Id.

Wednesday, 9/30/2009, the day Aris' body is discovered

Upton came home about 1:30 a.m. on September 30, 2009. 5/823. He was exhausted. Id.

O'Malley woke in the morning and went to work as normal. 5/823-824. When she returned home in the afternoon, Upton was cleaning a gun on her dining room table. Id. The disassembled parts were on a brown paper bag. 5/825. There was a box of bullets beside it. 5/825. She said she was going to walk the dogs and wanted the gun gone when she returned. Id. It was. Id.

About 4:00 p.m., Deborah Manoloules received an "imperative, urgent" call from Chris while she was driving. 7/1105-1106. They met up at a plaza and then went home. 7/1107-1109. Once home, Treefon called the police to have them perform a wellness check on Aris. 7/1109. Around midnight the police arrived and arrested Chris. Id.

While those events were happening at Chris' house

on Wednesday evening, Upton was at a bar/restaurant in Manchester, New Hampshire. 8/1153-1154. He met up with a former co-worker, David Vitale, about 8:30 to 9:30 p.m. Id. Upton told Vitale that he thought he could be in a lot of trouble. 8/1155. Upton said he had intended to go shooting with a friend and had brought his gun over the friend's house. Id. He left the gun at the friend's house overnight. Id. The friend took the gun and shot his (the friend's) brother. Id. Upton sought advice from Vitale on what to do. Id. After meeting with Vitale, Upton returned to O'Malley's, where he slept Wednesday evening. 5/825.

Aris is found dead during the wellness check

Treefon requested the wellness check of Aris at 5:35 p.m. on Wednesday, September 30, 2009. 3/317. The police arrived at Aris' 25 Ripple Cove Road, Hyannis home shortly thereafter. 2/285, 3/336. Officers found Aris on the first floor living room floor, face down. 2/297. His body was cold. Id. He had \$55.06 in his wallet. 3/403,409. Four shell casings were on the floor. 3/463. With the exception of a small throw rug and some items on the floor, the living room itself looked "very orderly." 3/461-462.

There were three bedrooms on the first floor.

3/457. The dresser drawers were pulled out in all those rooms. 3/458. However, the clothing contents of the drawers seemed in order. 3/460. The bedrooms in the basement were orderly and neat. 3/451. In general, the house did not appear ransacked or looted. 3/477.

Follow-Up Investigation

Medical Examiner Henry Nields testified that Aris was shot four times. 3/423,438-441. The cause of death was gunshot wounds to the head and torso. 3/442.

The police subsequently searched O'Malley's house but did not find anything. 5/827-828. On October 5, 2009, O'Malley and her sister searched her basement again and discovered a brown paper bag. 5/827-828,833. Inside the bag was a locked box. 5/831. Also in the paper bag was ammunition. 5/831,833. Four bullets were missing from the pack of fifty. 5/833, 6/951. O'Malley and her sister pried the lock off the box with pliers. 5/832. Inside the box was a gun. Id. O'Malley called the police after making this discovery. 5/834. A state police ballisticsian opined that the bullets recovered from Aris were fired from that gun. 6/957.

On October 1, 2009, Chris' mother Deborah spoke with the State Police. 8/1137-1138. She also testified before the grand jury on October 9, 2009.

Id. In neither instance did she say that Chris had implicated Upton when he returned from the Cape. Id. However, now, at this 2013 trial, she claimed that Chris had said, "Uncle Bob shot Theo Arie." 8/1140.

Mr. Upton's version of events

On the morning of Thursday, October 1, 2009, the State Police went to O'Malley's Newton residence. 6/1024. Upton went with troopers to the Newton Police Station, where he was interrogated. 6/1026-1027.

The videotaped interrogation started with the defendant being Mirandized. 7/1046-1047; I-4. After being told about his right to a lawyer if he could not afford one, Mr. Upton stated that he was unemployed. Id. He was laid off since July. I-11,30. He was having a "tough time" with money. I-11,62.

Upton told the police that Tuesday morning he took Chris for a ride, returning to Chris' house around 3:00 p.m. I-23,41. He told Chris and Treefon he was going to purchase a gun that afternoon. J-21-23, 68. He wanted to go target shooting. J-73.

Leaving Chris' house, Upton talked with his friend Joe Pepicelli, an Everett Police Officer, about where to go for range shooting. I-21,24,30; J-34. He wanted to go target shooting with Pepicelli. I-57.

Upton acknowledged that he purchased a 9 mm Ruger and 50 rounds of ammunition from a Stoneham gun store. I-14,18-29. He locked the gun in a case and put the key on his keyring. I-27-28. He placed the gun case and ammunition in a brown paper bag. J-43. He put the bag in the trunk of his car. I-26,42.

Upton initially stated he went to O'Malley's house. I-22. Then he stated he returned to Chris' house. I-25,42. When he went into Chris' house, the gun was still in his locked trunk, but he was not sure where he had put his keys. I-43,45. He took a shower at Chris' and used the bathroom. J-21-22. While doing so, Chris had the opportunity to go in his car trunk. Id. However, he never told Chris the gun was in the trunk. J-24. He did not show the gun to Chris. J-49. Upton later corrected himself by stating that he took a shower at Chris' house on Monday, not Tuesday. J-48. However, he did use Chris' bathroom on Tuesday. Id.

At some point in talking with Chris, Chris mentioned that his family should be better off financially. I-63-64,66. Chris brought up his grandmother's will. Id. He said his family was, "getting screwed." I-66. But Chris did not mention anything about going to Cape Cod. I-66.

Upton left Chris' house sometime after 5:00 p.m. on Tuesday. I-26,47-48. He did not check to see if the gun was still in the trunk. I-26. From there he went to O'Malley's residence, arriving about 7:00 to 7:30 p.m. I-26,48. He did not bring the gun inside because she did not like guns. I-29. He locked his car and put the keys on the dining room table. I-58-59. He cleaned O'Malley's house until about 8:00 or 9:00 p.m. I-16, 36, 48. O'Malley was there the whole time. I-48.

Around 9:00 to 10:00 p.m. Tuesday evening he went for a ride on the Mass Pike and Route 495. I-17-18, 37,49. Somewhere along the way he purchased a loaf of bread. I-37-38. O'Malley texted him while he was out, looking for him. I-18. He returned home at 11:00 p.m. I-36. He was right outside the house when he "played" with O'Malley, telling her he was still out. I-39.

Upton denied being on the Cape. I-31. He denied knowing whether Chris had relatives on the Cape. I-15. He told the police that he did not know the location of the gun. I-19-20. He last saw it was Tuesday in his trunk. I-26-27. He noticed it missing Wednesday. I-27. He said Chris or Chris' friends stole it. J-29,52.

Likewise, there were more miles on his car. I-58. Chris or Chris' friends must have taken it. I-59-60.

After additional questioning, Upton acknowledged going to the Cape on Tuesday with Chris. I-68-69. But he re-iterated, "I don't even know if I went to the Cape. I'm only going by the Cape by what you told me. (*sic*)" I-73.

Further in the interrogation, Upton acknowledged, "I went down there for a ride with him." J-3. Chris had asked Upton to bring him to the Cape. J-69-70. He explained that he did not originally tell the police about going to the Cape because he did not think it was important. J-16. At the end, Upton stated that he had lied about not going to the Cape to protect Chris. J-72. He was trying to keep Chris safe. Id.

It was dark out as they drove to the Cape. J-4. Upton described the roads they took, stating he was following Chris' directions. J-5. They went to the Cape because Chris said it was "very important" that he [Chris] meet someone. J-6. Chris said this was part of his straightening himself out. J-6,26. Upton was skeptical and told Chris to stop his "crap." Id.

They arrived in a Hyannis parking lot between 9:00 and 11:00 p.m. J-6,8-10,19. Upton thought his gun was in the trunk. J-7. He remained in the car while Chris left to meet someone. J-7-8,27.

Chris was gone for about 20 to 30 minutes. J-8, 10-11,27. Upton was nervous because he knew what kind of friends Chris kept. J-26. When he returned, Chris refused to say where he had been. J-11.

Upton drove Chris home. J-11. As they drove by some police officers working a construction detail, Chris put his hoodie on. J-12.

Upton denied knowing Chris had a plan to rob Aris of money. J-26. Upton denied that he went to the Cape with the purpose of getting money from Aris. J-33. He denied any involvement in Aris' death. J-56.

Upton denied knowing a lot about guns. J-46. When the detectives pointed out that he had owned guns, he responded that he had never fired them. J-46. He told the detectives that just because he had owned guns did not mean he knew a lot about them. J-53. He was not comfortable keeping guns around. J-46. Later, Upton stated that he had fired a gun. J-54. He denied saying he had not fired a gun. Id. The interrogation concluded with Upton again denied killing Aris. J-76.

Chris' trial testimony

Chris testified that he and his family were living in North Carolina when his grandmother died in 2007. 4/499-500. He was fifteen. 4/498. As they drove

back to North Carolina after the funeral, his mother asked, "How would you feel if I left all my stuff to one of you kids and not the other." 4/504-505. When they reached a rest area, his father asked him if he knew how to get a gun. 4/505. Treefon said he needed the gun because he wanted to kill his brother. 4/505.

When the family later moved back to Massachusetts, Chris started using marijuana. 4/630. He also started selling marijuana for his father. 4/507. Treefon gave Chris money to buy marijuana from wholesalers he knew in Boston and Framingham. 4/509,643. Fifteen-year-old Chris drove to these places unlicensed.³ 4/510.

While at the South Carolina boarding school, Chris and another student ran away. 4/524-525. Chris was arrested for breaking into cars and held in the county jail. 4/525.

During the summer of 2009, seventeen-year-old Chris stole jewelry. 4/648-649. He did not have lawful employment that summer. 4/658. He was using Ecstasy and smoking a lot of marijuana. 4/658. He sold marijuana for his father. 4/659, 5/688.

³ Chris' "brother in spirit," Dylan Laird, testified he never saw Chris drive unlicensed. 6/967-968.

Chris' testimony on plans to kill Aris

Before Chris was sent away to New York in January 2009, Chris and Treefon purchased beer for a party that Chris' friend Dwiggins was hosting. 4/511-512. When they delivered it to Dwiggins' house, Treefon told Dwiggins that his brother killed his mother. 4/513. Treefon said he would pay Dwiggins \$30,000.00 if Dwiggins would kill his brother. 4/513,515.

In a follow-up conversation with Dwiggins, Chris heard his father say he wanted Aris' death to look like suicide, perhaps by hanging. 4/515-516. Treefon also mentioned shooting Aris. 4/516-517. Treefon said he would give Dwiggins the money to buy a gun. 4/517.

Treefon also talked with Chris' friend Robert "Riz" Brown about killing Aris. 4/535, 670-671. Riz was a member of the New Bedford Bloods gang. 4/671. Treefon offered to pay Riz \$15,000.00 to kill Aris. 4/535,671-672. Riz agreed to do it. 4/536. Treefon wanted Riz to use a gun that Treefon kept in his golf bag, but it did not have bullets. 4/538. Dwiggins was to obtaining ammunition. 4/539. However, Dwiggins did not come through because his supplier only sold ammunition in large quantities. Id.

Then Treefon came up with another plan for Riz.

4/540. They were going to overdose Aris with heroin. Id. Treefon purchased needles out of state. 4/540-541. Dwiggins sold Treefon some heroin. 4/541. Treefon, Riz, and Chris took a dry run to the Cape. 4/540. Chris' job was to get Riz in the house. 4/545-546. Chris was also supposed to load the heroin into the needle. 4/546. Riz did not know how to do it, but Chris had seen others do it before. 4/546.

Chris and Riz subsequently tried to execute this plan. 4/547. Riz, Chris, and two friends drove to the Cape. 4/547-550. While in a public bathroom, Chris deliberately overcooked the heroin. 4/550-551. He intentionally thwarted his father's plan because he did not want his uncle to die. 4/552,673.

Chris called his father and blamed the failure on him, saying he had supplied the wrong needles. 4/552-553. Treefon responded by questioning what kind of son was Chris. 4/553. According to Chris, Treefon told Riz to stab Aris with a knife from the kitchen. Id. Riz was going to do it, but Chris talked him out of it. Id. Chris threw out the remaining heroin and needles, so his father would not try this plan again. 4/553-554.

Chris' testimony about schemes to save Hailey

Chris became involved with Upton, his uncle,

about a week before Aris died. 4/555. Upton told Chris he needed \$150,000.00. 4/557. A man was threatening to kill Upton's daughter Hailey. 4/557-558, 5/746. Chris, Upton, and Laird came up with a plan to steal cars from one of Upton's former employers. 4/558-560.

Another plan Upton devised was to steal a Ferrari and the contents of a safe from a cardiologist. 4/561.

Chris told Treefon about the threats against Hailey and their criminal enterprise proposals. 4/566. A couple days later, Treefon, Chris, and Upton met at Treefon's house. 4/566. They discussed the plans to steal the cars, rob the cardiologist, and a new plan to rob the owner of the car dealership. 4/566-567. Treefon liked the car theft plan. 4/567.

At some point, Chris came up with a plan to rob a drug dealer he knew as Duncan. 4/563. They later met up with Upton and discussed this plan. 4/564. They obtained mace and drove to Boston. 4/564. When they arrived, Duncan had several guests. 4/565. Instead of robbing Duncan, they purchased marijuana. 4/565.

Chris told the jury about another plan involving him, Upton, Burrows, Riz, and Riz' friends that called for robbing one "Spinks." 4/570. Chris did not elaborate on why that attempt failed. Id. He did

mention, though, that Riz's friend gave Upton a .22 rifle. 4/570. Upton later gave it to him (Chris). 4/570. Upton asked him to hold onto it. 4/571. They subsequently took that gun to the home of a "big drug dealer," intending to rob him. 4/571. When they got there, they saw the dealer had a "speaker box" on the door, so they just abandoned the plan. 4/571.

Thereafter, Treefon and Chris buried the rifle in the woods across the street from their house. 4/571. That rifle was subsequently recovered by the police. 6/1022-1023. They found it wrapped in a green trash bag and buried under some leaves. Id.

Chris' testimony about killing Aris, to save Hailey

In a subsequent conversation between Upton, Chris, and Treefon, Upton said that he now needed \$165,000 instead of \$150,000 because of the delay in raising the money. 4/568. In response, Treefon suggested another plan: killing his brother Aris. 4/568. Treefon said Aris had killed his mother. 4/568. Treefon could not get over that his mother had left everything to Aris. 4/640. Treefon said he wanted Upton to purchase a gun, because if he (Treefon) purchased it, the police would become suspicious. 4/568-569. But if Upton purchased a gun, the police

would not connect it to Aris' death. 4/569. Treefon agreed to pay Upton five installments over five days: four payments of \$40,000 and one of \$5,000. 4/570.

Chris told the jury that one proposal for gaining access to Aris' residence was for Upton to obtain a hat and a pizza box. 4/573-574. They were going to hide the gun in the pizza box. Id.

The final plans for killing Aris were made at a Chinese restaurant on Route 9. 4/575. Chris, Upton, and Treefon were present. Id. Treefon told Upton to purchase a gun that day and to go murder Aris on the Cape. Id. Afterwards, the three returned to Treefon's house. 4/576. Treefon warned Chris that, "if you give me any problems today, I'm sending you away to Wolf Creek," another military-like boarding school. 4/576.

Treefon also said to Chris, "You're the key to this. All you have to do is get him [Upton] inside. I'm not asking you to do nothing else." 4/576-577. Chris refused. 4/577. Upton responded by saying, "My daughter is going to get killed. Do you want innocent blood on your hands?" 4/577.

Treefon followed up by saying, "just go down and steal the jewelry, and nothing will happen to Theo Arie." 4/577. He was referring to Treefon's mother's

jewelry, which was supposedly in one of the bedrooms. 4/577-578. Chris said this was a bad idea because Aris would know he stole it. 4/578-579.

Treefon then proposed a new plan. 4/580-581. He said that Chris should just check whether the jewelry was in the house, and, if so, they would return to steal it another day when Aris was out of the house. Id. Treefon told Chris that when he visited Aris, he should do so under the pretext of asking him for a loan. 4/580. Treefon instructed that Chris should go for a cigarette break, but instead of doing so, he should search for the jewelry. 4/580. Treefon told Chris he needed to wear gloves and boots as he searched for the jewelry. 4/581.

As their meeting wrapped up, Upton mentioned he was going to buy a gun. 4/582. Chris asked why he was he doing so. Id. Upton replied it was because his daughter had been threatened, and they might need it when they steal cars from the dealership. 4/582.

Chris told the jury that he had a bad feeling his father and Upton were up to something. 4/632-633. His, "backup plan was, if something went wrong, I would just go and grab that jewelry ...and just try and talk them out of it." 4/633. He planned on "F'ing up" any

attempt to harm Aris, just as he had sabotaged the attempt to overdose Aris with heroin. 4/632-633.

According to Chris, Treefon and Upton left to go to the bank. 4/582. Treefon's and Deborah's joint bank account records were admitted into evidence. 8/1126. The records showed a \$300 ATM withdrawal on the date in question. 7/1116.

Before leaving for the bank, Treefon gave Chris \$150 and told him "to go smoke." 4/582. Chris was smoking marijuana with Laird and Riz when Treefon called and told him to hurry back. 4/583-584. On returning, Upton was waiting in his Mercedes outside Chris' house. 4/585. There were groceries in the car "just in case we got pulled over," Upton explained. 4/586. In addition, Upton had a small folding beach chair. 4/588.

Chris told the jury that Upton also had a gun and latex gloves. 4/586. The gun was in a case. 4/586. Upton gave the gun to Chris and suggested they go shoot it in the woods. 4/587. Chris declined, stating it would make too much noise. 4/587.

When they arrived at the Cape, Chris called Aris. 4/588-589. Chris put on clothes his father gave him, to wit, boots, latex gloves, and winter mittens.

4/590-591. Upton was wearing latex gloves, under weight lifting gloves. 4/592. Chris knew the gun was tucked in the back of Upton's pants. 4/592.

They started off for Aris' house, with Chris carrying the beach chair as Upton directed. 4/591. Chris told the jury that even though he was wearing winter mittens and Upton was wearing lifting gloves over latex gloves, the chair was supposed to make it look like they had been at the beach. 4/592.

As they walked to Aris' house, they discussed how they were going to perform the actual robbery on a return visit. 4/589. Upton said Chris should just hit Aris with the beach chair and commit the robbery that night. 4/590. Chris said "no." 4/593.

Upton also asked whether there was a safe in the house. 4/593. Upton brought pliers, saying that if there was a safe, he would use the pliers to pull out Aris' teeth to obtain the combination to the lock. 4/593. Chris told Upton not to do anything "crazy like that." 4/593.

When they arrived, Aris was watching the Red Sox. 4/594. Chris sat down next to him. Id. Upton sat across from him. Id. The folding chair was next to Upton. Id. Aris did not say anything about Chris

wearing winter mittens or Upton wearing latex gloves.
5/734-735.

After exchanging pleasantries, Chris asked Aris to loan him money. 4/595. He then excused himself. 4/595-596. But instead of going to the bathroom, he started searching through the drawers in all three upstairs bedrooms. Id. He had his winter mittens on as he went through the drawers. 5/739. Chris told the jury that even if he found jewelry, he would not have taken it because Aris would have known it was him. 5/745-746.

Chris went into the kitchen and summoned Upton to join him. 4/596. He quickly told Upton there was no jewelry and said they should leave. 4/596. Instead of doing so, Upton pulled out his gun. 4/597. Chris said, "Let's go. Let's go" and froze up. 4/597. Upton walked into the living room and shot Aris four times. 4/598.

Chris ran back to the car. 4/598-599. Upton walked. 4/599. They started driving, but then remembered they left the beach chair. 4/600. They returned and drove to the front of Aris' house. 4/600. Upton told Chris retrieve the chair inside. 4/600. When Chris refused, Upton pulled out the gun. 4/600. Chris ran in and retrieved the chair. 4/600-601.

As they drove back, there was a car behind them that Upton thought was the police. 4/603. He pulled out the gun. 4/603. However, the car passed uneventfully. 4/603. They continued their journey back to Chris' house. 4/604. Along the way, Upton talked about the payments he expected to receive. 4/605. He mentioned that he was going to burn down their house if Treefon did not pay him. 4/605. He stated he was going to kill Treefon just like he killed Aris, if Treefon did not pay him. 4/605. Upton instructed Chris that if he talked with his friends about what had happened, that he was not to bring up Upton's name. 4/611-612. Instead Chris was to say that he (Chris) had killed Aris. 4/612.

Arriving back at Chris' house, Chris found his father sleeping in the living room. 4/606. Chris woke him and said, "Are you finally fucking happy? Theo Arie is dead. ...Bob just killed him." 4/606. Treefon responded by saying Chris should say a prayer. 4/606. He told his father that Upton was outside and wanted to talk with him. 4/607. Treefon and Upton talking about getting rid of the gun by putting it in a blast furnace. Id. They also talked about using a bank account and Aris' credit cards to pay Upton. 4/608.

Chris fell asleep. 4/610. When he woke up, Treefon told him to go smoke with Laird. 4/610. Laird picked up Chris and they went for a drive. 4/611. Following Upton's prior instructions, he told Laird that he had killed Aris. 4/612. However, later he told Laird he had not killed Aris. 4/612. He told Laird what had happened. 4/612. As they drove around, Chris received a phone call from his mother. 4/613. She asked him to meet in a mall parking lot. 4/613-614. He met his mother there. 4/614.

They returned home, but Chris left again to smoke marijuana with Laird. 4/615. When he returned home again, his father had a pen and paper. 4/616. He told Chris to confess in writing for the police. Id. He added that he would pay Chris \$350,000.00 if Chris left Treefon's name out. 4/616. Chris wrote out that statement, but his mother destroyed it. 4/617. At some point Treefon called the police and an hour later they arrested him at his house. 4/623, 5/752-753.

Chris told the jury that both he and Upton were held in pretrial detention in the Barnstable County House of Correction. 4/623. They were supposed to stay away from each other. 4/623-624. However, Upton and another man came up to him when he was in the chapel.

4/623-624. Upton said that the man wanted to stab Chris. 4/624. Upton asked Chris to give him his [Chris'] paperwork on the case. 4/624.

By June of 2010, nine months later, Chris had new lawyers, Attorneys Alch and Leonard. 4/625, 5/753. In that month Chris and his new lawyers met with the police. 4/635. In 2011, they had a second meeting with the police and prosecutor. 4/636.

Chris denied to the jury that any promises had been made to him in exchange for his testimony. 4/617, 5/776-777. He told the jury he had no understanding that he would receive beneficial treatment. 5/777. He told the jury he was testifying because it was the right thing to do. 5/778. Chris denied any malicious intent in going to the Cape. 5/746. His sole motivation was to save Upton's daughter's life. Id. He accepted Upton's statement that they could not go to the police about the threats to Hailey. Id.

III. ARGUMENT

1. New evidence proves that Chris had an undisclosed cooperation agreement with the Commonwealth and that he did not tell the truth in this trial

There is new evidence since Mr. Upton's trial that proves there was an undisclosed cooperation

agreement between Chris and the Commonwealth. The Commonwealth's failure to disclose the existence of the cooperation agreement violates Brady v. Maryland, 373 U.S. 83, 87 (1963). Commonwealth v. Burgos, 462 Mass. 53, 62 (2012).

A. Chris now admits he had a cooperation agreement with the Commonwealth

Prior to the start of this trial, defense counsel brought to the court's attention the issue of whether any promises, rewards, or inducements had been given to Chris. T.254; A-20. Defense counsel provided an affidavit by Attorney Ruth McLaughlin, saying she overheard ADA Manoog state during Treefon's trial that Chris was going to receive a charge reduction to second degree murder. T.255-256; A-22.

Counsel argued,

it strains credulity to think that Chris Manoloules, who is charged with a first degree murder, testified in the last trial [against his father Treefon] for the Commonwealth, is going to testify in this trial for the Commonwealth and has nothing --- nothing -- nothing unspoken, nothing tacit --- in other words, he's going to walk out of here after that trial thinking in his head that he could still get prosecuted for first degree murder. That's rubbish. That's not true. Even if it's unspoken, even if there's been a raised eyebrow, that has to be disclosed. If Chris Manoloules six months from now pleads out to some double digit determinate sentence, I'm going to be kind of upset. But it is just not believable. T.258-259.

Counsel added,

...it just seems to me to be impossible --- because I know Mr. [Chris] Manoloules' attorney (*sic*). I have spoken to them. And they're highly, highly competent. They're great lawyers. So, they're not idiots.

It just seems to me impossible that this kid is going to do this, testify twice, first against his father, then against his uncle, charged with first degree murder, and there is nothing. T.260.

In response, the prosecutor stated the only promise made to Chris was that anything he said would not be used against him. T.260-261. Otherwise, no rewards, promises, or inducements were offered to Chris in his father's case or in this case. T.260-262.

When Chris testified at Upton's trial, he denied any promises were made to him for his testimony. T.617. He denied there was any understanding he would receive favorable treatment. T.776-777. Chris testified similarly at his father's trial. A-261, 298-299 (TREE-781,1039-1040). When asked why he was testifying at Upton's trial, Chris replied, "to do the right thing." T.778.

However, three years later, on October 11 and 12, 2016, while this direct appeal was pending, Chris testified in the Wrongful Death lawsuit. A-309-312 (10/11/16-42). He told that civil jury that he had an unwritten agreement with the district attorney's

office.⁴ A-372,378-380,434-435,474-475,479-480
(10/11/16-102, 108-110; 10/12/16-39,40,79-80,84-85).
He was told by the district attorney that if he
cooperated, he would not receive a life sentence. A-
479-480 (10/12/16-84-85). Chris explained that his
criminal trial testimony was the result of pressure
"from a lot of attorneys." A-474 (10/12/16-79).

Most important for instant purposes is that Chris
told the civil jury that he had no memory of Treefon
and Upton ever talking about killing Aris. A-474
(10/12/16-79). His testimony to the contrary in the
criminal trials was what the prosecution wanted to
hear. A-378-379 (10/11/16-108-109). He said it to
avoid a life sentence. A-378-380 (10/11/16-108-110);
A-434-435,474-475,479-480(10/12/16-39-40,79-80,84-85).

**B. The Commonwealth's significant charge and
sentencing reductions prove there was an agreement**

A defendant's due process rights are violated
where the prosecution does not disclose evidence that
is material to the issue of guilt, including
"[e]vidence tending to impeach the credibility of a
key prosecution witness...." Commonwealth v. Hill, 432

⁴ The motion for new trial quoted Chris' wrongful
death testimony in detail over 2.5 pages of single-
spaced text. See A-781-783.

Mass. 704, 715 (2000). There does not need to be an "explicit contractual plea agreement." Commonwealth v. O'Neil, 51 Mass. App. Ct. 170, 179 (2001).

In Commonwealth v. Hill, 432 Mass. 704, 711 (2000) the District Attorney denied that it had an agreement with an "important" witness. The Court disagreed, citing, *inter alia*, the fact that the Hampden District Attorney had reduced the witness' drug trafficking charge (which had a fifteen-year mandatory minimum) to possession with intent to distribute (for which the witness received a two-and-a-half-year sentence). Id. at 712. The Court held that this reduction, "strongly supports the existence of an agreement" between the witness and the District Attorney's office. Id.

In the instant case, the Commonwealth reduced Chris' Murder charge to Manslaughter shortly after Upton's trial. A-194. The Court adopted the Commonwealth's recommendation of a 12-to-15 year commitment. A-195, 216-217, 223-224 (PLEA-21-22, 28-29). In addition, the Court adopted the recommendation for minimum mandatory sentences on the remaining

indictments.⁵ *Whereas no benefit could accrue to the Commonwealth at that time, the only reason it would do so is because of a prior understanding with Chris.*

The dramatic reduction in the homicide charge, with a recommendation of a 12 to 15 year committed sentence, rather than a life-without-possibility-of-parole sentence, "strongly supports the existence of an agreement" with Chris. Hill, 432 Mass. at 711. Likewise as to the other minimum mandatories. Id.

C. Chris' plea hearing confirms that he was rewarded for testifying at Upton's and Treefon's trials, and that the charge and sentencing concessions were a quid pro quo for his cooperation.

Chris' docket clearly shows that the reduction of the charge from murder to manslaughter was a reward for his testimony against Treefon and Upton. The

⁵ Count 2, Armed Assault with intent to Rob or Murder with a Firearm, G.L. c. 265 § 18(b), has a minimum sentence of 5 years, maximum of 20 years. The Commonwealth recommended a commitment of five years to five years and a day, to be served concurrent with the manslaughter sentence. A-216 (PLEA-21).

Count 3, Assault and Battery with a Dangerous Weapon, causing serious bodily injury, G.L. c. 265 § 15A(c)(i), carries a maximum sentence of 15 years. The Commonwealth recommended a commitment of five years to five years and a day, concurrent. A-227 (PLEA-22).

Count 4, Armed Assault in a Dwelling (firearm), G.L. c. 265 § 18A, carries a minimum sentence of ten years. The Commonwealth recommended a commitment of ten years to ten years and a day, concurrent. A-227 (PLEA-22).

docket entry on that reduction states, "Defendant testified in Comm v. T. Manoloules & Comm v. R Upton in Barnstable County Superior Court." A-194.

Likewise, at the plea hearing the prosecutor cited to Chris' cooperation as the basis for the charge reduction and sentencing recommendation. A-216-217 (PLEA-21-22). The prosecutor denied that there was an agreement with Chris prior to Upton's trial, but his choice of words suggests otherwise. He stated, "no discussions concerning a change of plea were ever *openly* discussed at all until after the completion of the trial of Robert Upton." A-216 (PLEA-21) (emphasis added). As such, the prosecutor did not unconditionally declare that there were *no* discussions. Rather, the matter was not "openly" discussed. This wording suggests that there had been some kind of informal discussion or understanding.

This suggestion is confirmed by Chris' counsel, who said that the Commonwealth's concessions were a *quid pro quo* for Chris' cooperation. A-222 (PLEA-27). However, he argued, they were not a sufficient *quid pro quo* given the level of Chris' cooperation. *Id.*

Furthermore, Chris did not start cooperating with the prosecution until nine months after he was

arrested. 5/755,776. He was held without bail during that time. 5/754. His June 2010 meeting with the state police was the first time he told the Commonwealth of his father's alleged involvement. 5/776. Soon thereafter, in September 2010, Treefon was indicted. A-231. Treefon's indictment occurred *one year after the murder and nine months* after Chris and Upton were indicted. A-3,190.

A fair inference is that there must have been some understanding with the Commonwealth for Chris to implicate his father in an otherwise unindictable offense. That is, apparently the Commonwealth had no idea of Treefon's supposed involvement before Chris' cooperation. There must have been some promise made to Chris, for him to suddenly provide evidence for a first degree murder indictment against his own father.

In short, the Commonwealth's reduction of Chris' homicide charge and its sentencing recommendations did not spontaneously materialize because of unilateral largesse by the Commonwealth. Instead, they were *quid pro quo* for Chris' cooperation.

D. Chris' counsel's expression of gratitude to the prosecutor for being a "man of his word" shows that there was a promise made and kept

At Chris' plea hearing, his attorney praised the

prosecutor (who was also the same prosecutor for Treefon's and Upton's trials). A-219 (PLEA-24).

Chris' counsel stated,

I want to also state for the record that my relationship with Mr. Glenny - this is the first time I've met the gentleman. He's a credit to the district attorney's office and to the criminal justice system. **He's a man of his word** and he's been a very reasonable man for me to work with. My respect for this particular court is boundless. PLEA-24 (emphasis added).

These laudatory words clearly communicate that the district attorney had *given his word* and that *he had abided by that word*. It is an unambiguous statement that *some kind of promise had been made*, and kept.

Quite telling is that the prosecutor did not respond by dumbfoundedly asking what defense counsel was referring to. His silence speaks volumes. It must be taken as acquiescence.

2. A new trial should be granted because the newly discovered evidence casts real doubt on the defendant's conviction

"A defendant seeking a new trial on [the grounds of newly discovered evidence] must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction."

Commonwealth v. LeFave, 430 Mass. 169, 176 (1999).

"The motion judge decides not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury's deliberations." Commonwealth v. Grace, 397 Mass. 303, 205-06 (1986).

Where a motion for new trial is premised on the Commonwealth's failure to disclose a cooperation agreement that had been specifically requested, that failure is "excused only if 'the error did not influence the jury, or had but very slight effect.'" Commonwealth v. Hill, 432 Mass. 704, 716 (2000).

There is no doubt that the evidence outlined herein is "new." Chris' testimony in the 2016 civil action and his criminal plea took place after this 2013 trial.

The new evidence is also credible. Chris' civil trial testimony was under oath, recorded, and made to a jury. His statements were against his penal interests. M.R.E. 804(b)(1); Commonwealth v. Carr, 373 Mass. 617 (1977). He knew when he testified in the civil case that he risked perjury charges for testifying contrary to his criminal trial testimony. A-402,483,486 (10/12/16-7,88,91).

A. A new trial should be granted because Chris' cooperation agreement would have been a real factor in the jury's deliberations

The new evidence would have been a "real factor in the jury's deliberations." This brief was purposefully drafted so that Chris' testimony appears at the end of the Facts section. If one reads the Commonwealth's evidence up until Chris' testimony, it arguably casts the defendant in an unflattering light. But there is no evidence of homicidal conduct. At best the Commonwealth has Laird's testimony that the defendant, Treefon, and Chris discussed killing Aris. 6/977. But even Laird did not take the conversation seriously. In his own words, he "didn't really honestly believe that this was going to happen." Id. Furthermore, his immunized testimony is not sufficient, by itself, to convict the defendant of anything. G.L. c. 233, § 20.

There was also Upton's text to the car salesman on Tuesday morning about imminently expecting money from his brother-in-law. 6/929. However, that does not support that the defendant was planning to murder Aris. It also does not make sense, because there was no evidence as to how Aris' death would instantly trigger significant money into Treefon's hands. In

the light most favorable to the Commonwealth, the defendant's text arguably supports that he hoped to come into immediate funds by stealing valuables from Aris. However even that is speculative because there was no evidence that Aris had those kind of valuables (let alone \$77,000.00, the amount Upton owed for O'Malley's car) at his house. 8/1193.

Absent Chris' testimony, the only evidence that places Upton on the Cape the night Aris died is the defendant's own statements to the police. However, those statements do not place him in Aris' home, nor that he did anything wrong while at the Cape.

The evidence did show that Upton hid the gun used to kill Aris in O'Malley's basement. 5/824,832. On that issue, defense trial counsel argued Mr. Upton was guilty of being an accessory after the fact because he hid the gun. 2/280-281; 8/1191. Counsel told the jury they could infer that on the ride back from the Cape, Chris told Upton that he had killed Aris. 2/280-281. He was concerned that Chris had used his gun. 8/1191. Counsel astutely argued that if Upton was culpable, he would have thrown that gun in the ocean. 8/1204.

Thus, Chris' testimony was essential to the Commonwealth's case. 8/1185,1202. More particularly,

his credibility was essential to the Commonwealth's case. In arguing against the defendant's Motion for a Required Finding of Not Guilty, the prosecutor stated that Chris' testimony was so significant that it, by itself, satisfied the Commonwealth's burden of proof. 8/1159. The prosecutor likewise told the jury in closing argument that if they believe Chris' testimony, they need not consider the other evidence. 8/1215.

Since Chris' credibility was at issue, the jury should have heard about his cooperation agreement. "[W]here the witness's credibility is a critical issue in the case, the requirements of due process also mandate that the jury be aware of 'evidence of any understanding or agreement as to a future prosecution.'" Commonwealth v. Michel, 367 Mass. 454, 460 (1975), *quoting* Giglio v. United States, 405 U.S. 150, 154-155 (1972). An otherwise compelling case for the Commonwealth can be completely undercut by the fact that a witness is testifying under a cooperation agreement. As the court has stated, "we are aware of the effect that any inference of prosecutorial favoritism might have on a jury's estimation of a witness's credibility... Such information [i]s capable

of creating a reasonable doubt which did not otherwise exist as to guilt." Commonwealth v. Collins, 386 Mass. 1, 10 (1982).

Chris was not testifying because it was "the right thing to do" and because he had nothing to do with causing Aris' death, as he told the Upton jury. Instead, he was testifying because he was culpable for Aris' death and he was promised he would not receive a life sentence if he cooperated. A-372,378-380,434-435,474-475,479-480 (10/11/16-102, 108-110; 10/12/16-39,40,79-80,84-85).

Had the jury known that Chris was purchasing his liberty by cooperating with the Commonwealth, they would have looked at his testimony with heightened circumspection. Upton's version of events, and his averment that Chris was the guilty party, would have had much greater weight if the jury knew of Chris' true motivations. 2/279; 8/1185,1205-1207.

B. A new trial should be granted because the fact that Chris plead guilty to Manslaughter, and accepted his culpability for Aris' murder, undermines all his trial testimony

Chris' guilty plea and admission that he is culpable for Aris' death undermine all of his testimony and the Commonwealth's theory of the case.

Chris was very clear in his trial testimony that he loved his Uncle Aris. He deliberately foiled Treefon's earlier attempt to kill Aris by heroin overdose. 4/550-552. Chris repeatedly told the jury he wanted nothing to do with harming his uncle on the night in question. 4/577,632-633; 5/721; 7/746.

In fact, he told the jury, he was not there to commit any crime at all. 5/721. His sole purpose was to identify whether any jewelry was present. 4/580-581. If he located any, the plan was that they would return another day and steal it. Id. Chris explicitly told the jury that if he had found jewelry, he would not have taken it. 5/745-746. He would not have taken it because, had he done so, Aris would know who stole it. Id.; 4/580. While that was supposed to be the plan, Chris was suspicious that Upton and Treefon may want to harm Aris. 4/632-633. But Chris intended to foil any such a plan, just as he had with the heroin overdose plan. 4/632-633.

Chris was not only the Protector of Aris, but also the Savior of Hailey. He told the jury that Upton tried to "guilt him" into cooperating by saying he would have Hailey's blood on his hands if he did not help. 4/577. Chris told the jury that the reason

he reluctantly conspired to steal the jewelry was to save his cousin Hailey's life. 5/746.

Chris accented his claim of selflessness by blending in a touch of victimization. Chris told the jury that his father threatened to send him back to military school if he did not cooperate. 4/576.

In closing argument, the prosecutor made Chris out to be a malleable 17-year-old who was taken advantage of by both his father and his uncle. 8/1218-1219. Each of them, the prosecutor argued, was using this vulnerable teenager for their own purposes: Treefon, so he could obtain revenge for not obtaining an inheritance; and Upton, who just wanted money. Id.

However, Chris' plea contradicts all of his testimony. Chris' plea is an acknowledgement that he was a joint venturer responsible for Aris' death. His plea is an admission that he did not go to Aris' house with the intent of scouting for a future robbery.

4/580-581; 5/745-746. He was not a vulnerable teenager who innocently "froze" when his uncle suddenly pulled out a gun and shot Aris dead. 4/597. He was not motivated by altruistic concern for Hailey's life or because his father was threatening to send him away again. 4/576; 5/746. In short, Chris'

plea brings into question the entire theory pursued by the Commonwealth at trial. In addition, it supports Upton's defense argument that Chris is a conniving prevaricator, and that he is the one responsible for Aris' death. 2/279; 8/1185,1205-1207.

Furthermore, if Chris testified truthfully at Upton's trial, then he had no culpability in Aris' death. At worst he was guilty of conspiring to break and enter Aris' unoccupied house in the future and to steal at that future time. As such, the Commonwealth should have *dismissed* all of the charges that were pending against him, not reduce the murder indictment to manslaughter and give him mandatory minimums on the remaining counts. Thus, the Commonwealth's failure to dismiss all of Chris' charges is an admission by the Commonwealth that it knows Chris prevaricated at Upton's trial.

Furthermore, it must be noted that there was a substantial change in Chris' testimony between Treefon's trial and Upton's trial. In Treefon's trial, he testified *numerous* times that he went to Aris' house with the intent of actually taking the jewelry that very night. A-249-250 (TREE-734-735); A-262-263 (TREE-815-816); A-268 (TREE-821); A-271 (TREE-837); A-

274 (TREE-840); A-277 (TREE-843); A-280 (TREE-846); A-285 (TREE-971); A-291 (TREE-977); A-293-294 (TREE-979-980); A-295-296 (TREE-1007-1008). Treefon's counsel cross examined Chris on this point and noted that by taking the jewelry that night, Aris would know it was Chris who took it. A-284 (TREE-850).

Chris apparently realized this flaw in his story, so he changed it for Mr. Upton's trial. The new and updated story for Upton's trial was that he was just going to search for the jewelry on the night in question. 4/581; 5/721,745-746. Under this revised plan, he would return and steal it on a later date, when Aris was not home. Id. Had he taken it on the night in question, he told Upton's jury, Aris would have known Chris was the culprit. 4/580; 5/745-746.

To buttress this new version, Chris invented additional fiction, not presented at Treefon's trial, that as he and Upton walked to Aris' house, they were planning on how they would return and execute the future theft. 4/589; *Compare* A-258-260 (TREE-742-745). The fact that Chris so blatantly changed his story to remedy the flaw pointed out by Treefon's counsel shows that he would do and say anything to blame others, in exchange for favorable treatment.

A new trial is required because Chris is not the vulnerable teenager who committed no crime the night Aris died, as was portrayed at trial. According to his plea, he is a joint venturer in Aris' homicide. His changing testimony would have been a "real factor in the jury's deliberations" in considering whether the Commonwealth has proven its case, and in considering the defendant's contention that Chris is solely responsible for Aris' death.

C. A new trial should be granted because Chris' entire story depends on Treefon hiring Upton to kill Aris for money, but new evidence -- the wrongful death verdict in Treefon's favor -- proves that Treefon did not hire Upton

According to Chris, his father plotted to kill Aris for inheritance. In furtherance of that goal, Treefon hired Upton to kill Aris. Much of Upton's trial was devoted to showing this supposed conspiracy between Treefon and Upton. Thus, Treefon's culpability is central to Upton's conviction because without payment from Treefon, Upton would have no reason to kill Aris.

While Treefon was found not guilty in his criminal trial, the Commonwealth's failure to satisfy the *Webster* "beyond a reasonable doubt" standard did not prove that Treefon was not complicit in this

matter. However, Treefon's favorable verdict in the 2016 civil wrongful death litigation does prove that he had nothing to do with Aris' death. A-307.

This newly discovered evidence is significant. Even though Chris testified in two criminal trials that his father hired Upton to kill Aris, he told the civil jury that he had no knowledge of such a plan. A-474 (10/12/16-79). The civil jury apparently believed Chris' testimony to be the truthful version.

The fact that the civil jury found Treefon not culpable in Aris' death undercuts the Commonwealth's entire theory that this was a murder for hire at Treefon's behest. The civil verdict substantiates that "justice may not have been done" in this criminal trial. M.R.C.P. 30(b).

3. The ruling on the motion for new trial

In denying the motion for new trial, the trial judge ruled that he had already inquired of the prosecutor prior to trial whether there was a cooperation agreement. A-807-808. The judge ruled that the prosecutor's credibility was not diminished by Chris' civil testimony and thus he was not going to repeat the same inquiry of the prosecutor. Id. The judge further noted that there was no affidavit from

Chris' attorneys that there was a cooperation agreement. A-808. The judge questioned the credibility of Chris' civil testimony because in that testimony he did not provide details on the cooperation agreement. Id. Nor did he explain at the civil trial why he concealed the existence of the agreement, and he did not explain the inconsistencies between his civil and criminal trial testimony. Id.

However, the defendant requested an evidentiary hearing on the motion in order to receive testimony from Chris, his counsel, and the prosecutor. A-794, 798. The judge's queries as to the omissions in Chris' civil testimony could have been answered by Chris testifying under oath at an evidentiary hearing.

Further, it is unrealistic that Chris' attorneys would provide an affidavit in support of Upton's motion. Given the allegations herein and Chris' adverse posture to Upton, Chris' counsel would not willingly cooperate. The only way such evidence could be uncovered is if Chris' counsel was subpoenaed to testify.

Lastly, testimony should have been received from the prosecutor to explain, at a minimum, the charge reduction and the sentencing recommendation. Also,

rather than speculating as to what the prosecutor meant by a plea not being "openly" discussed, the better course of action would be to directly ask the prosecutor that question at an evidentiary hearing.

The motion judge made a point of stating that Chris' civil trial testimony was not credible because he had a "substantial motive to protect his family's financial interests by undermining the credibility of his own testimony" in the criminal trials. A-808. At first glance, that statement appears plausible.

However, that reasoning fails for several reasons. First and foremost, Chris' testimony in the civil case *was against his own penal interests* in that he risked a perjury charge. M.R.E. 804(b)(1); Commonwealth v. Carr, 373 Mass. 617 (1977); A-402,483, 486 (10/12/16-7,88,91).

Second, Chris threw his father under the bus by giving the authorities information that caused Treefon to be indicted for murder. Then Chris testified against his own father at his murder trial. Whereas Chris had no qualms about sending his father away to prison for life, it is unlikely that he suddenly decided to prevaricate to benefit *their* financial interests, over *his own* penal interests.

Third, the civil jury apparently found Chris' testimony to be credible, as evidenced by the jury's finding for Treefon.

4. The defendant should be granted a new trial pursuant to G.L. c. 279 § 33E

The defendant respectfully requests a new trial pursuant to G.L. c. 278 § 33E. Commonwealth v. Gould, 380 Mass. 672, 680 (1979).

CONCLUSION

For all of the reasons stated herein, the defendant requests that his convictions be reversed.

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APPELLANT'S M.R.A.P. RULE 16(k) CERTIFICATION

I, Theodore Riordan, Esq. hereby certify that the appellant's brief and appendix complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass.R.A.P.16(a)(6), 16(e), 16(f), 16(h), 18, and 20.

Dated: January 23, 2019

Theodore Riordan, Esq.

APPENDIX

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Appendix volume 4 is the Commonwealth's impounded opposition to the motion for new trial.

Appendix volume 5 contains the remainder. While this volume contains more recent pleadings, they are placed in the fifth volume in order to preserve the pagination of the prior volumes.

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COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss.

Supreme Judicial Court
SJC-11459

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

ROBERT UPTON,
Appellant

On Appeal From a Judgment in
Barnstable Superior Court 0972CR167

BRIEF OF APPELLANT ROBERT UPTON
